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No. 91-7358

In The

*SUPREME COURT OF THE UNITED STATES*

October Term, 1991

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT,
DODGE CORRECTIONAL INSTITUTION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**BRIEF FOR RESPONDENT**
**IN OPPOSITION TO PETITION**

SUMMARY OF ARGUMENT

The petitioner requests this court to review the United States Court of Appeals for the Seventh Circuit's decision changing the standard of review on habeas corpus for errors committed similar to those in Doyle v. Ohio, 426 U.S. 610 (1976). In so arguing, the petitioner contends that the court's decision violates the sixth and fourteenth amendments to the constitution.



It is a fundamental rule of judicial restraint that the United States Supreme Court will not reach constitutional questions in advance of the necessity of deciding them. Prior to reaching any constitutional questions, this court will consider non-constitutional grounds for decision. On the basis of judicial restraint, this court should deny the petitioner's request.

A significant non-constitutional basis exists for affirming the Seventh Circuit's determination. Prior to this case, the Seventh Circuit, as well as all other circuit courts of appeals, granted habeas corpus relief for Doyle violations if it could not be shown that the errors were harmless "beyond a reasonable doubt." The facts and circumstances surrounding the petitioner's conviction establish that any Doyle violations which occurred were harmless error under this traditional standard of review.

Courts look to a number of factors in determining the existence of harmless Doyle errors. One such factor is the frequency of the references to silence. In this case, there existed only four prohibited references to post-Miranda silence occurring during a trial which consumed over 900 pages of transcript. The focus of comments on the defendant's silence were on the petitioner's attempt to tailor his evidence to the state's case.

Courts also look to how the prosecution uses the defendant's silence in determining whether improper comments on a defendant's silence were harmless "beyond a reasonable doubt." In this case, the defendant had numerous pre-Miranda warning contacts with both

citizens and police following the homicide during which he failed to mention that his victim needed aid or assistance. Comments on pre-Miranda were properly admissible. Improperly admitted comments on the petitioner's silence were directed towards showing that the petitioner was attempting to tailor his testimony to the state's case. The state's case did not focus on post-Miranda silence.

In determining whether harmless error occurred, courts also consider the opportunity to grant a motion for mistrial or to give a curative instruction. In the case at bar, the petitioner did not object to all of the alleged comments on post-Miranda silence that have been found objectionable. Additionally, once an objection was raised, the petitioner did not ask for curative instructions.

Lastly, courts also consider and weigh the evidence indicative of guilt. The only contested issue at trial was whether or not the petitioner intended to shoot his victim. Substantial evidence exists supporting the jury's determination that the shooting was not an accident. The shooting victim had to crawl to his neighbor's residence in order to obtain medical assistance. He immediately demanded that law enforcement authorities be summoned. He also warned that his wife should not be allowed to return to the residence in which the shooting occurred.

Physical evidence also showed that the shooting was not accidental. The petitioner testified that the gun accidently went off as he was falling to the ground. However, the trajectory of the bullet which entered Roger Hartman contradicted the



petitioner's story insofar as the bullet traveled on a horizontal or slightly upward trajectory.

The jury also had before it sufficient reason not to find the petitioner's testimony credible. The petitioner had to admit while testifying that he often lied and often used aliases. On cross examination, the defendant lied concerning his desire to return to Georgia and bail his friend out of jail. The jury also could consider that the petitioner fled the crime scene, sought no help for his shooting victim, and from the time of the shooting until he was arrested made no attempts to convince anyone that the shooting was accidental.

Because the evidence in this case establishes that if error occurred, it was harmless error "beyond a reasonable doubt," it would be unnecessary for this court to reach the constitutional issue of whether or not a different harmless error test should apply on collateral review. Therefore, this is not the type of case that this court should grant a writ of certiorari.

The petitioner also argues that the Seventh Circuit decision conflicts with Chapman v. California, 386 U.S. 18 (1967), and inappropriately reflects a diminished harmless error test for Doyle violations. The Seventh Circuit decision does not conflict with Chapman v. California, 386 U.S. at 18, insofar as Chapman did not involve habeas corpus collateral review. What must be remembered is that appellate review in state courts will still involve the Chapman standard. State courts will continue to apply the harmless "beyond a reasonable doubt" standard when reviewing Doyle

violations. The Seventh Circuit determination does not conflict with Chapman because the less stringent standard articulated in this case only applies to habeas corpus collateral review.

The cases the petitioner cites in support of his petition do not conflict with the determination of the Seventh Circuit in this case. Citing Rose v. Clark, 478 U.S. 570 (1986), and Yates v. Evatt, ___ U.S. ___, 111 S. Ct. 1884 (1991), the petitioner argues that this court has consistently applied the harmless "beyond a reasonable doubt" standard in habeas corpus proceedings. In so arguing, however, the petitioner ignores the fact that the court's application of that standard in those cases did not involve the violation of a "prophylactic" rule. Rose and Yates involved trial errors in instructing the jury on the elements of the offenses. Consequently, those cases are distinguishable from this case because the errors related directly to the guilt or innocence of the defendant. As noted by the Seventh Circuit, Doyle type errors do not directly involve evidence relating to the guilt or innocence of a given defendant.

Employing the law of evidence, the Wisconsin Supreme Court ruled that the evidence of the petitioner's homosexuality as it related to his relationship with Roger Hartman was more probative than it was prejudicial. Consequently, the court ruled that it was properly admissible on the issue of motive. The Seventh Circuit correctly ruled that federal courts cannot issue writs of habeas corpus on perceived errors of state law unless the errors render the verdict unreliable. In this case, that standard was not met.



## ARGUMENT

### I. THE SEVENTH CIRCUIT'S USE OF A LESS STRINGENT TEST ON COLLATERAL HABEAS CORPUS REVIEW FOR ALLEGED TRIAL ERRORS NOT INVOLVING THE GUILT OR INNOCENCE OF THE DEFENDANT SHOULD NOT BE REVIEWED BY THIS COURT.

#### A. This court should deny the petition for certiorari because the constitutional issue which has been raised can be avoided by determining that the Doyle errors committed at trial were harmless "beyond a reasonable doubt."

A unanimous Wisconsin Supreme Court concluded that while there were Doyle type errors committed during the petitioner's trial, those errors were "harmless beyond a reasonable doubt." It is the position of the respondent that regardless of which standard of review is adopted for Doyle errors raised on habeas corpus, whether it be the Chapman harmless" beyond a reasonable doubt" standard cr the lower standard adopted in this case, the Doyle errors which occurred were harmless. Consequently, it is respondent's position that the petition for writ of certiorari should not be granted insofar as judicial restraint would require this court not to address the constitutional issue of whether a diminished standard should apply.

It is a well-settled rule of law that "[p]rior to reaching any constitutional questions, federal courts must consider non-constitutional grounds for decision." Jean v. Nelson, 472 U.S. 846, 854 (1985), quoting Golf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981), City of Mobile, Ala. v. Bolden, 446 U.S. 55, 60 (1980), Kolender v. Lawson, 461 U.S. 352, 361, n.10 (1983). This is a

"fundamental rule of judicial restraint." Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 157 (1984). As this court stressed in Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944), "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable." See also Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 445-46 (1988); United States v. Gerlach Live Stock Co., 339 U.S. 725, 735 (1950).

No matter which standard of review is employed, the facts underlying the petitioner's conviction establish that any Doyle errors were "harmless beyond a reasonable doubt." This is so because the Doyle errors themselves would have had little or no effect on the jury's deliberations. Lawfully admitted evidence showed that prior to his arrest, the petitioner had numerous chances to seek help for Roger Hartman and encountered numerous persons to whom he could have explained how the shooting occurred. The evidence showed that he failed to do so. Lawfully admitted evidence also showed that the petitioner continued in his silence after his arrest but before he was given his Miranda warnings. Consequently, any evidence or comments concerning his post-Miranda warning silence were redundant and cumulative to the evidence regarding his silence which was properly admitted at trial. Given the fact that the jury heard numerous lawful references to the petitioner's silence, the fact that the jury heard brief



erroneously admitted references to silence renders such error significantly less meaningful.

Another factor which should be considered in evaluating error for harmlessness is the intensity and frequency of the references to silence at trial. In this case the petitioner's silence was infrequently mentioned. The courts below found only four short references to prohibited post-Miranda silence made during cross-examination and closing argument in a transcript which totals approximately 900 pages. In terms or intensity, the comments on silence were merely indirect references to the petitioner's continuing failure to render aid or request help for his shooting victim, or were references to the fact that his testimony was tailored to the state's case.

In determining harmlessness, another factor which should be considered is the trial court's opportunity to grant a motion for mistrial or to give a curative instruction. The petitioner did not object to all of the alleged comments on post-Miranda silence that were found violative of the petitioner's constitutional rights. On the occasions that an objection was raised, the petitioner did not ask for a curative instruction (D. 7, Ex. M, pp. 881, 901, 883).[1]

Lastly, a court should consider the degree of other evidence indicative of guilt. There were only two witnesses to the shooting of Roger Hartman. Only the petitioner and Hartman were there. The

[1] All citations to the record refer to the document number("D"), any included exhibit to the document ("Ex.") and to the page number ("p.").

jury heard Roger Hartman's version of the shooting through statements he gave to his neighbors while suffering from a wound which would eventually take his life. The jury heard the petitioner's version that the shooting was accidental when the petitioner took the witness stand to testify. The jury, evaluating the credibility of the two versions, accepted Hartman's and rejected the petitioner's. Many strong and justifiable reasons exist for the jury's decision.

Speaking through neighbors who overheard his statements offered soon after he was shot, Hartman told the jury that he had been shot by his brother-in-law, "Todd Brecht" (D. 7, Ex. M, p. 164). Hartman took care to emphasize that it was his brother-in-law who had shot him. If it was an accidental shooting, Hartman would have no reason to emphasize who the person was who shot him.

Hartman knew that his assailant was in the basement of his home. Hartman related that "[h]e's down there in the house in the basement" (D. 7, Ex. M, p. 153). If the shooting had been an accident, Hartman would have had no reason to tell his neighbors the location of the petitioner.

One of the first things Hartman requested was that his neighbor call the sheriff (id.). If the shooting was an accident, Hartman would not have demanded that the sheriff be called.

Hartman did not want his wife or neighbor to go near his house after the shooting. Referring to his wife, Molly, Hartman stated "Oh my God, don't let her go in that house, don't let her near that house" (D. 7, Ex. M, p. 166). Hartman also warned that his



neighbor shouldn't be allowed to go into his house in light of the shooting (D. 7, Ex. M, p. 169). If the shooting was accidental, why would Hartman not want his wife or neighbor to enter their home?

Additionally, Hartman explained that he "sneaked out" of his home and crawled on his hands and knees to get to his neighbors (D. 7, Ex. M, p. 167). If the shooting was an accident, why did he have to "sneak" out of his home?

Ironically, Hartman knew that he was shot with a .22 caliber weapon. Therefore, he must have seen the petitioner with the weapon prior to being shot in the back (D. 7, Ex. M, p. 164). This undercuts the petitioner's defense of accident insofar as Hartman seeing the petitioner with the gun in hand, is inconsistent with the petitioner's version of the shooting (D. 7, Ex. M, pp. 588-89).

The jury found the petitioner's version of the shooting incredible with good reason. The petitioner had to admit that he was a liar and often used aliases (D. 7, Ex. M, pp. 605, 611). While on the witness stand, the petitioner testified it was his intent when he got into trouble in Georgia to go back to Wisconsin with the Hartmans, work on his problems, get a job, and remain in Wisconsin (D. 7, Ex. M, p. 616). He made it clear he had no intent to return to Georgia (D. 7, Ex. M, p. 627). However, the state was able to produce letters which the petitioner had written to an inmate in Georgia which stated, contrary to the petitioner's earlier representation, that he intended to return to Georgia and

bail out his friend no matter what it cost (D. 7, Ex. M, pp. 621-22). During its rebuttal case, the state circumstantially proved that on the morning of the shooting, the petitioner had telephoned the Georgia prison where his friend was incarcerated and told a guard that he would be down to Georgia within days to bail the friend out (D. 7, Ex. M, pp. 758-60).

The petitioner's version of the shooting was also undermined by the physical evidence. The petitioner was approximately 5 feet 7 or 8 inches tall (D. 7, Ex. M, p. 663). The petitioner testified that the gun went off as he was falling down (id.). Roger Hartman was 6 feet tall (D. 7, Ex. M, p. 384). Hartman was shot in the back with the bullet exiting through his chest (D. 7, Ex. M, pp. 553-54). The trajectory of the bullet was horizontal to slightly downward (D. 7, Ex. M, pp. 553-54). If the petitioner tripped and the gun went off as he was falling, it would be expected that the bullet's trajectory would be horizontal or slightly upward.

The petitioner's accident account of the shooting is also inconsistent with his conduct following the shooting. The petitioner fled the crime scene. Flight, in and of itself, is indicative of guilt. Despite numerous opportunities, he sought no help for Roger Hartman. Instead, he claimed that he engaged in a failed attempt to take his own life (D. 7, Ex. M, p. 591). He encountered numerous individuals, both non-law enforcement and law enforcement, and never even suggested that he had shot someone and that they might need help. Such evidence was lawfully introduced and undercuts his accident claim. That course of conduct is simply



inconsistent with the way human nature deals with an accident. When an accident occurs, human nature drives us to render aid. Persons do not decide to immediately kill themselves when they accidentally injure someone. They help them.

The jury's determination that the shooting was intentional was also supported by the physical evidence found at the scene of the crime. If the shooting was accidental, why was a bedroom phone left off the hook, rendering other phones in the house inoperable (D. 7, Ex. M, pp. 222, 255)? The jury could have inferred that the petitioner rendered the phones inoperable so Hartman could not call for help. Why did the petitioner take the precaution of hiding the .22 cartridge boxes under a blanket (D. 7, Ex. M, p. 271, 391-92)? The jury could have inferred that they were hidden so Hartman would not realize the petitioner was in possession of a gun. Why were all of the beer cans in the upstairs portion of the house hidden (D. 7, Ex. M, pp. 272, 408-409)? The jury could have inferred that the beer cans were hidden so that Hartman, a recovering alcoholic, would not see them and realize that the petitioner was violating his probation and the rules of the Hartman household by drinking. Why did the petitioner take the time to place the butcher block containing cutlery normally stored on top of a kitchen counter under the sink inside a cabinet (D. 7, Ex. M, pp. 400-402, 408)? The jury could have inferred that the knives were hidden so that Hartman would not have easy access to a weapon with which he could defend himself. Although such evidence is circumstantial, it

underscores and supports the verdict and contradicts the petitioner's story that the shooting was accidental.

B. The decision of the Seventh Circuit Court of Appeals did not diminish the protection of the fifth amendment insofar as the Chapman standard will still be used in state courts for evaluating whether Doyle errors are harmless.

Throughout the petitioner's brief filed in support of his petition for writ of certiorari, he suggests that the Seventh Circuit Court of Appeals' decision significantly impacts the protections afforded criminal defendants under the fifth and fourteenth amendments to the constitution. The petitioner overstates the impact of the Seventh Circuit's decision.

In determining whether the Doyle errors which occurred at the petitioner's trial were harmless or whether they required reversal, both the Wisconsin Court of Appeals and the Wisconsin Supreme Court employed the Chapman standard. The unanimous Wisconsin Supreme Court concluded that the Doyle errors were harmless "beyond a reasonable doubt." State v. Brecht, 143 Wis. 2d 297, 319, 421 N.W. 2d 96 (1988). Under the Seventh Circuit's decision, use of the Chapman standard by state courts will not change. In order for Doyle errors to not result in a reversal, state appellate courts will still have to conclude that the errors were harmless "beyond a reasonable doubt." Under the Seventh Circuit's decision, it is only upon collateral habeas corpus review that state court determinations under the Chapman standard will not be overturned



unless the Doyle errors "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 944 F.2d 1363, 1375 (7th Cir. 1991) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Consequently, the impact of the Seventh Circuit's decision on a defendant's constitutional rights to silence and due process is limited.

C. The decision of the Court of Appeals for the Seventh Circuit is not in conflict with earlier decisions of this court.

The petitioner contends that the Seventh Circuit's decision conflicts with the decisions of this court in Rose v. Clark, 478 U.S. at 570 and Yates v. Evatt, 111 S. Ct. at 1884. Petitioner argues that these cases conflict with the decision of the Court of Appeals for the Seventh Circuit because in Rose and Yates this court applied the Chapman standard in collateral habeas corpus proceedings (Petition at 19). While Rose and Yates both used the Chapman standard in the habeas corpus context, both cases are distinguishable from the one at bar because they involve errors going to the heart of the guilt or innocence of the accused. As was pointed out by the Seventh Circuit in this case, these cases are distinguishable from cases such as this where the alleged errors involved the enforcement of a "prophylactic" rule not directly involved with the guilt or innocence of the accused. Brecht v. Abrahamson, 944 F.2d at 1375.

The Court of Appeals for the Seventh Circuit addressed the question of whether or not this court had previously applied the

Chapman standard in cases where the alleged trial errors did not directly involve the guilt or innocence of the accused. The court concluded that this court had not applied the Chapman standard in that context. Brecht, 944 F.2d at 1374-75. Additionally, the Seventh Circuit directly analyzed Yates v. Evatt and Rose v. Clark to determine whether or not the Chapman standard must be used on collateral habeas corpus review. The Seventh Circuit concluded that both Rose and Yates involved errors in instructing the jury on the elements of the charged crime and, therefore, directly involved the guilt or innocence of the accused. Both Rose and Yates dealt with constitutional rules designed to protect the innocent from an unconstitutional finding of guilt. The Seventh Circuit contrasted Yates and Rose with the alleged Doyle violations in this case and found that Doyle violations involve a "penumbral" rule not directly involving the guilt or innocence of an accused. Brecht, 944 F.2d at 1374-75. Consequently, the Seventh Circuit correctly concluded that this court had not applied the Chapman standard in circumstances similar to those now before the court. Id.

## II. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT CORRECTLY REFUSED TO REVIEW ALLEGED ERRORS INVOLVING THE APPLICATION OF STATE EVIDENTIARY RULES.

The evidence at trial showed that Roger Hartman had a difficult time accepting the petitioner's homosexuality and asked him not to engage in such activities while living at the Hartman residence. Petitioner had also been advised by Hartman and



Hartman's wife that he could not bring a homosexual friend into their house. Hartman also conveyed to the petitioner that he ought to get professional counseling for his homosexuality (D. 7 Ex. M, p. 392-93, 400, 434).

Based upon the above, it is an inescapable conclusion that Roger Hartman could not accept the petitioner's homosexuality and, despite the suggestion of the petitioner to the contrary, the above facts show that Hartman's feelings and beliefs were conveyed to the petitioner.

Both the trial court and the Wisconsin Supreme Court determined that the evidence concerning Hartman's disapproval of the petitioner's homosexuality suggested a possible motive for the shooting and, therefore, made more probable the state's claim that Brecht had, in fact, murdered Hartman. Basing its ruling on state evidentiary law, the Supreme Court of Wisconsin concluded that the trial court did not abuse its discretion in determining that evidence of Brecht's homosexuality was probative on the issue of motive in the case. The Wisconsin Supreme Court reinforced its position by noting that the trial court had given the jury a limiting instruction on the proper consideration of the homosexuality evidence. State v. Brecht, 143 Wis. 2d at 321-22.

The Court of Appeals for the Seventh Circuit properly concluded that the question of whether the probative force of the evidence involving Brecht's homosexuality exceeded its potential for improper use were questions in the law of evidence. Citing Cupp v. Naughten, 414 U.S. 141 (1973), and Lisenba v. People of

State of California, 314 U.S. 219 (1941), the Seventh Circuit noted that errors in admitting or excluding evidence did not violate the constitution unless the trial as a whole is so infected that the verdict is no longer reliable. Brecht, 944 F.2d at 1366. The court also noted that a "federal court may not issue [a] writ [of habeas corpus] on the basis of a perceived error of state law." Id., quoting Pulley v. Harris, 465 U.S. 37 (1984).

The Seventh Circuit refused to issue the writ on a perceived error of state law and did not find that the alleged error in admitting the evidence of homosexuality so infected the trial as a whole as to render the verdict "no longer reliable."

Applying the correct law, and evaluating the proceedings below under the correct standards, the Court of Appeals for the Seventh Circuit made the correct ruling. The petitioner suggests that the Seventh Circuit failed to evaluate the evidentiary ruling under the "fundamental fairness" standard. Ironically, in making his argument, the petitioner cites the "fundamental fairness" standard set forth in Cupp v. Naughten (Petition at 23). The petitioner, however, ignores the fact that the Seventh Circuit cited that standard as one which is to be applied when a defendant requests a reversal on habeas corpus on the basis of an erroneous state court ruling. Brecht, 944 F.2d at 1366.

Given the fact that the Court of Appeals for the Seventh Circuit applied the proper law and reached the correct conclusion, this issue does not present the type of question which would be the proper subject for review by this court.



## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Dated this 30th day of April, 1992.

Respectfully submitted,

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April 30, 1992

William K. Suter, Clerk
United States Supreme Court
One First Street N.E.
Washington, D.C. 20543

Re: Todd A. Brecht v. Gordon A. Abrahamson
Case No. 91-7358

Dear Mr. Suter:

Enclosed for filing in the above-entitled action please find twelve copies of our Brief for Respondent in Opposition to Petition.

By copy of this letter, and as indicated by the attached affidavit of mailing, a copy of the enclosed has been served this date upon counsel for petitioner. An affidavit of mailing is also enclosed in this regard.

Thank you for your attention to this matter.

Sincerely,

Jeffrey M. Gabrysiak
Assistant Attorney General

JMG:hms

Enclosures

cc: Allen E. Schoenberger

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Case No: 91-7358

Case Name: Todd A. Brecht v. Gordon A. Abrahamson

STATE OF WISCONSIN )
) ss.
COUNTY OF DANE )

Holly M. Stark, being first duly sworn, on oath deposes and says that: she is not a party to the above-entitled action; she is employed in the office of the Department of Justice of the State of Wisconsin in the capacity of legal secretary;

On the 30th day of April, 1992, she served one copy of the Brief For Respondent in Opposition to Petition upon:

Allen E. Schoenberger
One East Pearson Street
Chicago, Illinois 60611

by mail, in the following manner:

She properly mailed a true and correct copy of the aforesaid documents, addressed as stated above, by first-class mail, postage prepaid, but without any request to the postal officers for the return thereof in case of nondelivery to the person addressed and deposited the same in a United States mailbox in the City of Madison.

HOLLY M. STARK

Subscribed and sworn to before me
this 30 day of April, 1992.

Notary Public, State of Wisconsin
My Commission: expires